BP Exploration (Alaska), Inc. *and* Paper, Allied-Industrial Chemical and Energy Workers, International Union, Local 8-369, AFL–CIO. Case 19–CA–26791

July 29, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND COWEN

On June 26, 2001, Administrative Law Judge James M. Kennedy issued the attached decision. The Charging Party Union and General Counsel filed exceptions and the supporting briefs, and the Respondent filed partial cross-exceptions and a supporting brief, as well as answering briefs.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this decision and to adopt the recommended Order.

For the reasons set forth below, we adopt the judge's finding and conclusion that the Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to provide copies of certain reports requested by the Union. We agree that the reports were subject to the attorney-client privilege.[1] The *Detroit Edison* case (discussed infra)[2] provides a balancing test for accommodating a union's need for information and an employer's need to protect confidential information. We do not pass on whether that test is to be applied to lawyer-client communications. It may be that such communications hold a special place in the laws and values of our society and are thus not subject to the balancing test of *Detroit Edison*. Rather than pass on this issue, we shall assume arguendo that the test applies. Under that test, we conclude that the Respondent had no duty to supply the requested information.[3] Applying the balancing-of-interests test set forth in *Detroit Edison*, we find (1) that the Respondent has established a strong confidentiality interest with respect to the reports; (2) that this interest clearly outweighs the Union's asserted need for the reports themselves (as distinct from the information contained in them); and (3) that, given the Union's insistence on disclosure of the reports, the Respondent discharged its obligations under the Act by offering to provide the Union with certain information contained in the reports, an accommodation the Union categorically rejected.

Facts

The essential facts are as follows. On June 29–30, 1999,[4] a State of Alaska Occupational Safety and Health Agency (AKOSH) inspector made an unannounced inspection of the Respondent's building known as "Skid 19." This inspection was the result of a complaint to AKOSH concerning certain hazards and escape routes alleged to be present at Skid 19.

The AKOSH inspector advised that he had determined that there were several matters that would become the subject of a citation, such as the fact that the width of egresses in Skid 19 were too narrow because they were less than the 28 inches required by AKOSH regulations that applied to petrochemical refineries. The Respondent believed, however, that Skid 19 was not a refinery, that the AKOSH inspector was therefore applying the wrong standard, and that such standards had never been applied before. The AKOSH inspector told the Respondent that he would research the matter further but intended to issue citations within the next 90 days.

The Respondent assigned a "need to know" group of managers and supervisors to formulate a response to the anticipated citations. The group consisted of Mel Pye (the Respondent's health and safety manager), Grant Vidrine (Pye's supervisor), Ronnie Chappell (public affairs/government relations), Eammon McNaughton (safety manager), and Frank Musgrave (operations manager). Jeff Conrad, the Respondent's attorney, participated with this group to provide legal advice. On July 29, Conrad sent a memo to Vidrine in response to Vidrine's request for legal advice regarding the Respondent's compliance with AKOSH standards. In this memo, Conrad requested a study of egress and exit access throughout Skid 19 to determine the scope of the Respondent's compliance with these standards, the cost to establish means of egress of at least 28 inches, the impact on the Respondent's operations to establish these features, and the safety benefits that would result. Conrad also specifically advised that the information gathered should be maintained separately in a file marked "Confidential Attorney-Client Privilege" and should not be circulated to anyone not in the "need to know group."

Pye then hired VECO, an engineering consulting group, to conduct the investigation requested by Conrad. Pye instructed VECO that their work was confidential, to

[1] The judge also found that the requested reports were protected by the work product doctrine. Because we find the attorney-client privilege applicable, we find it unnecessary to pass on whether the work product doctrine also privileged the reports' nondisclosure. Member Cowen would find that the work product doctrine privileged the reports' nondisclosure because, among other things, the Union has not demonstrated that it was unable to obtain the same information without undue hardship by conducting its own investigation.

[2] *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

[3] Member Liebman would apply the *Detroit Edison* test, and would reach the same result. In Member Cowen's view, if the attorney-client privilege covers the information requested, the Respondent is not required to bargain over a waiver of the privilege. Accordingly, Member Cowen would not apply the *Detroit Edison* balancing test in such circumstances in deciding whether the Respondent violated the Act by failing to provide the requested information.

[4] All dates are in 1999, unless otherwise indicated.

be maintained under the attorney-client privilege. In late August, VECO filed two copies of its report with Pye. Pye forwarded one copy to Conrad and placed the other in a ring binder labeled "privileged" in a locked cabinet in his office.

After reviewing the VECO report and determining that it would be virtually impossible to make the changes to Skid 19 that the AKOSH inspector seemed to have suggested, Pye wanted to determine what it would cost to replace Skid 19 in its entirety. Pye discussed the cost issue with Conrad. Upon Conrad's advice, Pye requested the Respondent's engineering department to conduct a study, again under a seal of attorney-client privilege, telling him how much it would cost to completely replace Skid 19.

In September, the engineering department gave Pye two copies of a report known as the Skid 19 report. Pye kept one copy of the report inside the binder with the VECO report and gave the other copy to Conrad.

The original AKOSH citation was issued October 26, and was amended November 15. A third report was commissioned by the Respondent for the purpose of arguing to AKOSH that the refinery standard did not apply and that the correct standard was the life safety code. This study was written by Jack Woycheese, a professional fire consultant engineer. The Woycheese report was submitted to AKOSH, and a final informal meeting was conducted between AKOSH, the Respondent, and the Union on December 3. A copy of the Woycheese report was given to the Union at this meeting. On December 14, AKOSH vacated the challenged portion of the amended citation concerning the width of the egresses.

Shortly after the first citation had been issued, the Union requested a copy of the VECO and Skid 19 reports. Pye denied the request, responding that the reports had been requested by the Respondent's attorneys in anticipation of litigation and were therefore privileged. The instant unfair labor practice charge followed.

On November 15, 2000, after the Board's Regional Office advised that it would issue a complaint unless the matter was resolved, a meeting was held in Prudhoe Bay attended by both union and management representatives. Pye explained to the Union the general nature of what was contained in the VECO report and the Skid 19 report. He also offered to provide a one-page summary of the reports. In addition, Pye offered to gather other information that the Union might need in response to any specific concerns that it might have. The Union believed it was entitled to both reports and offered a confidentiality agreement. The meeting ended without agreement as to the reports.

Based on the foregoing, the judge found that the reports were relevant, but that the Respondent's failure to supply the requested reports did not violate 8(a)(5) and (1) of the Act because the reports were protected from disclosure under the attorney-client privilege and the work product doctrine. The Union excepts on the grounds that the reports are not protected from disclosure under the attorney-client privilege or the work product doctrine. The General Counsel and the Union except on the grounds that the Respondent had an obligation to seek an accommodation of its privilege concerns and that the judge improperly concluded that the Union had not shown that it would encounter any undue hardship in obtaining itself the information contained in the reports. The General Counsel also excepts to the judge's failure to perform an in-camera inspection of the reports.

Analysis

In resolving the issues posed, we apply the balancing test of *Detroit Edison*, supra, and its progeny. As the Board has explained,

> An employer has a statutory obligation to provide requested information that is potentially relevant and will be of use to a union in fulfilling its responsibilities as the employees' exclusive bargaining representative. . . .
>
> A union's interest in relevant and necessary information, however, does not always predominate over other legitimate interests. . . . Thus, in dealing with union requests for relevant but assertedly confidential information possessed by an employer, the Board is required to balance a union's need for the information against any legitimate and substantial confidentiality interest established by the employer.

GTE California, Inc., 324 NLRB 424, 426 (1997).

Here, the reports sought by the Union contained information to which the Union had a strong statutory claim. The reports themselves, however, were protected by the attorney-client privilege. Had the Union sought only the factual information contained in the reports, the Respondent might well have been required to provide that information, for the attorney-client privilege would not apply.[5] Contrary to the judge's suggestion, meanwhile, the Union's ability to obtain the information through its own independent investigation would not excuse the Respondent's duty to furnish it. See, e.g., *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995). But the Union did not seek the information contained in the reports. Instead, it insisted on the reports themselves—and nothing less. We conclude that the Union has not demonstrated a need for the actual reports that outweighs the Respondent's interest in preserving the attorney-client privilege. Nor, given the Union's position, was the Respondent required to do more than to offer the accommodation that it did.

[5] E.g., *Upjohn Co. v. U.S.*, 449 U.S. 383, 395–396 (1981) (distinguishing between disclosure of attorney-client communication and disclosure of facts contained in communication).

The legitimacy of the Union's need for information contained in the reports is clear. Information related to workplace safety and health is generally relevant and necessary for the Union to carry out its bargaining obligations. *Detroit Newspaper Agency*, supra; *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 29 (1982), enfd. sub nom. *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983).

On the other hand, an employer certainly has a strong confidentiality interest with respect to a communication that is subject to the attorney-client privilege, which generally protects from disclosure confidential communications between attorneys and their clients for the purpose of obtaining or providing legal advice. *Patrick Cudahy, Inc.*, 288 NLRB 968, 969 (1988). Cf. *General Dynamics Corp.*, 268 NLRB 1432, 1433 (1984) (balancing employer confidentiality interest in document prepared in anticipation of litigation with union's need for document in connection with pending grievances).

We agree, in turn, with the judge's finding that the reports were subject to the attorney-client privilege. In a memo dated July 29, the Respondent's attorney, Jeff Conrad, directed that the VECO report be created so that he could obtain all relevant information pertaining to Skid 19 and its compliance with the AKOSH refinery regulations. Likewise, the Skid 19 report was requested by Conrad to determine the cost of replacing Skid 19 in its entirety, if it was found to be in violation of AKOSH standards. Conrad instructed that both reports be created so that he could provide adequate legal advice to the Respondent on handling the AKOSH citations. The reports were also requested for the purpose of informing Conrad of all the relevant facts concerning the AKOSH citations and the extent of potential litigation. Conrad specifically indicated an intention to invoke the privilege on the Respondent's behalf, if necessary, by directing that both reports be titled "Confidential Attorney-Client Privilege."

The VECO and Skid 19 reports related to the purpose of obtaining legal advice, as opposed to making a potential business decision. The memo from attorney Conrad clearly indicates that he requested the studies to gather the necessary facts to adequately advise his clients as to whether the Respondent's facilities were in compliance with AKOSH's safety standards. The reports were designed to inform Conrad to what extent the company needed to oppose the citation. Health and Safety Manager Pye testified that the reports were necessary to aid the Respondent's attorneys in anticipated litigation of the AKOSH citation. He testified that the reports were intended to provide documentation for litigation to defend the Respondent, if AKOSH applied a strict "refinery" standard. In addition, Conrad specifically asked that the report contain information concerning the costs of complying with the requirement asserted by AKOSH. Such information is integral to weighing the potential costs and benefits of litigation and thus to providing legal advice.

The testimony of Mike Kreger, an attorney retained by the Respondent to work on the AKOSH investigation, adds further support to this view. He testified that after it became apparent that an AKOSH citation would be issued, Conrad ordered the studies in an attempt to find out what kind of problem the Respondent was facing. Kreger testified that Conrad asked consultants to do a "walk around" of the facility, and assuming the refinery standard applied, to identify the exposure the Respondent was facing in the lawsuit and to decide the extent of the concern the Respondent had on its hands. This clearly was communication between attorney and client to obtain information necessary to provide adequate legal advice.

We are persuaded, then, that the reports in this case were privileged attorney-client communications.[6] And it was the reports—not the factual information contained in them—that the Union sought. On behalf of the Respondent, Safety and Heath Manager Pye provided an oral summary of the reports to the Union during a November 15, 2000 meeting. He also offered to provide a one-page summary of the reports. The Respondent offered to discuss with the Union alternative ways of providing the Union with information on the subjects addressed by the reports and asked the Union if there was specific information that the Respondent could provide. The Union, however, would accept nothing less than complete copies of the reports.

Neither the General Counsel nor the Union has persuasively explained why the Union required access to the reports themselves and why the factual information contained in the reports, which could have been pursued, would not have satisfied the Union's needs. Under the circumstances, then, the Respondent had no obligation to bargain with the Union over an accommodation that would have entailed disclosure of the actual reports. We need not decide what compelling Union need might require an employer to disclose a communication subject to the attorney-client privilege. Nor must we decide whether disclosure to the Union, if arguably compelled by the Act, would effect a waiver of the privilege. In the context of this case, what matters is that the reports were subject to the privilege, that the prospect of disclosing the reports raised a substantial concern that the privilege would thereby be waived, and that the Union failed to demonstrate its need for the reports themselves, as opposed to the factual information contained in the reports.

We therefore adopt the judge's finding that the Respondent's failure to provide the Union with the re-

[6] See *Upjohn Co. v. U. S.*, supra, 449 U.S. at 394. See also *In re Grand Jury Subpoenas*, 123 F.3d 695 (1st Cir. 1997) (privilege applies if the information relates to facts communicated for the purpose of securing a legal opinion, legal services, or assistance in a legal proceeding).

quested reports did not violate Section 8(a)(5) and (1) of the Act, and we dismiss the complaint accordingly.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. July 29, 2002

Peter J. Hurtgen,	Chairman
Wilma B. Liebman,	Member
William B. Cowen,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

S. Nia Renei Cottrell, for the General Counsel.
Jeffrey S. Heller, of Houston, Texas, for the Respondent.
William F. Bocast, Chairman, PACE Local 8-369 Safety and Health Committee, of Anchorage, Alaska for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Anchorage, Alaska, on April 17, 2001, upon a complaint issued on November 20, 2000, by the Regional Director for Region 19. The complaint is based upon an unfair labor practice charge filed by Paper, Allied-Industrial Chemical and Energy Workers, International Union, Local 8-369 (the Union), on December 17, 1999.[1] It alleges that Respondent, BP Exploration (Alaska), Inc., (sometimes called BPXA) has violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). Respondent denies the allegations and asserts certain privileges.

ISSUES

The only issue here is whether or not the attorney-client privilege or the attorney work-product privilege permits Respondent from withholding otherwise producible information from the Union. The material clearly meets the test of relevance both for collective-bargaining purposes and for the purpose of allowing the Union to properly perform its representational functions. When faced with the privilege defense, the General Counsel now argues that even if the defense is viable, Respondent had an obligation to bargain about how the material could be produced without breaching the privilege. Respondent contends that there is no obligation to bargain over matters covered by either the attorney-client privilege or the attorney work product privilege. It further observes that the Union never demanded to bargain over producing the information, but that in an effort to forestall the instant complaint, they actually did bargain. BPXA says no reasonable accommodation could be made, given the Union's stance.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

According to the pleadings, BPXA, a Delaware corporation, operates hydrocarbon gas processing facilities at least three "gathering centers" in the Prudhoe Bay, Alaska oilfield. It admits that its operations meet the Board's direct and indirect outflow jurisdictional requirements. I therefore find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It is also clear from the pleadings that the Union is a labor organization within the meaning of Section 2(5) of the Act and I so find.

II. ALLEGED UNFAIR LABOR PRACTICES

BPXA is now the sole operator of the Prudhoe Bay oilfield, having recently merged with the other operator, ARCO. Similarly, the certified union, a local of Oil, Chemical and Atomic Workers, AFL–CIO became the Charging Party when its parent merged with the United Paperworkers International Union, AFL–CIO in January 2000. No issues are presented concerning the lawful successorship of either party. Recognition has continued unabated.

To simplify the background of the actual issues presented here, it suffices to say that one of the processes to which the crude oil is subjected prior to being shipped south on the Aleyeska Pipeline is the separation of natural gas from the crude oil. The natural gas is further treated to remove water vapor. This process is performed in the gathering center building known as "Skid 19," a multistory structure containing the separation modules. After treatment, both the water and the natural gas are sent out to be reinjected into the ground, while the crude oil is transported to Pumping Station No. 1 at the head of the pipeline.

As a result of a complaint to the State of Alaska Occupational Safety and Health Agency (AKOSH) concerning certain hazards and escape routes said to be extant at Skid 19, AKOSH inspector Roman Gray made an unannounced inspection on June 29–30. Pursuant to AKOSH procedures, he held both opening and closing conferences with BPXA's management personnel. The Union's safety committee representatives were also present and also accompanied Gray as he made his rounds. At the closing conference, Gray advised that he had determined that there were several matters which would become the subject of a citation. Some of these seemed quite serious: the fact that Skid 19 did not have exit doors above the ground floor, that the widths of doors and pathways to exits were too small, and there did not seem to be ways to immediately exit the building without escaping toward likely hazards rather than away from them.

Inspector Gray advised that in reaching those conclusions he was applying a standard for petrochemical refineries. From Respondent's point of view, Gray was misapplying the regulations. They believed themselves bound only by an industrial standard for this type of facility. Gray's contention was alarming because none of the facilities on the North Slope was a refinery and such standards had never been applied before. Gray told them that he would research the matter further, but that he intended to issue a citation over these and some safety sign matters within the next 90 days.

[1] All dates are 1999, unless otherwise indicated.

A "need to know group" was assembled by Respondent's health and safety manager, Mel Pye, acting on instructions from his manager, Grant Vidrine. In addition to Vidrine, the team consisted of, according to Pye, "Jeff Conrad, our attorney, [2] Ronnie Chappell who is our public relations individual, Eamonn McNaughton who is our Safety Manager in Anchorage, and then the Operations Manager which at the time was Frank Musgrave." Pye then gave the following testimony:

> Q. [By Mr. Heller] What did your team you just identified, what did they want to know about the facilities, particularly in relationship to the refinery standard and this egress standard? What did you want to know?
>
> A. For the refinery standard we wanted to know how AKOSH was going to apply it.
>
> Q. Okay.
>
> A. But basically we had—it was very simple, we weren't a refinery and—and the Federal Code—we were in a different, industrial code they call them, than what refineries were. Refineries had a separate industrial code. So it was very clear to us that that didn't apply. For the obstruction in the egress pathways, basically what it states and what the inspector had talked about was that everywhere you could walk, anywhere you walk in that module had to be 22 or 28 inches wide. And so to . . . us it seemed very impractical that everywhere you walk, anywhere in a module has to be that width.
>
> Q. Okay.
>
> A. And so we wanted to understand what the magnitude of that was. If OSHA stuck to a very strict interpretation of their regulation what does that mean to us as a company that has to make everywhere you can walk in a module 28 inches wide.
>
> Q. All right. How did you go about trying to get that understanding then, Mr. Pye? What was it that you did?
>
> A. Jeff Conrad, the attorney, requested that we do a study to figure on how big it was. [Quotation edited for clarity.]

On July 29, Conrad wrote a memo to Grant Vidrine. It reads as follows:

> This memorandum responds to your request for legal advice yesterday regarding BP Exploration (Alaska) Inc.'s ("BPXA") compliance with Alaska Department of Labor Standards and Safety, occupational safety and health standards at various BPXA facilities in Alaska. Specifically, you requested me to advise you whether BPXA's North Slope facilities comply with applicable egress and exit standards.
>
> Please gather all facts related to egress and exits at the mentioned facilities. Specifically, at each facility, where applicable, determine the cost to establish means of egress of at least 28 inches. Also, describe the impact on BPXA operations to establish these features, and the safety benefits that will result.
>
> Once I receive this information from you, I will advise you whether BPXA's facilities are in compliance with the two mentioned safety standards.
>
> Please follow BPXA policy regarding the management of privileged documents. Specifically, ensure that all documents that are generated to obtain the requested information are maintained in a file marked "Confidential Attorney-Client Privilege". Do no place non privileged documents in the file. Keep the file in a lockable file cabinet that is dedicated to privileged documents. Do not circulate privileged documents to any person who is not in the "need to know group".

After receiving these directions, Vidrine and Pye accepted the conditions and also decided that a frequently used engineering consultancy, VECO Engineering, would be hired to perform the study Conrad wanted and to author a report for his use. All facts were to be subject to the attorney-client privilege. VECO agreed to that condition and assigned a small team to perform the work.

In late August, VECO filed two copies of its report with Pye. Pye forwarded one to Conrad and put the other in a locked cabinet in his office. The report was in a ring binder labeled as "privileged." According to Pye, the only person in the need-to-know group who chose to read it was Musgrave, the facility manager, although Pye's Prudhoe Bay "alternate" (his counterpart during scheduled rotating 2-week tours of duty) [3] Jim Barrett did have access to it.

Conrad obtained the services of two other attorneys to assist him in the AKOSH matter and made copies of the VECO report for each. They were Anchorage private practitioner Mike Kreger, and a BP attorney in Chicago, Jim Pickett, both of whom specialize in OSHA matters.

After reviewing the report and determining that it would be virtually impossible to make the changes which the AKOSH inspector seemed to be suggesting, Pye realized that it might become necessary to replace the Skid 19s in their entirety. [4] He decided to consult with Conrad, who gave him some advice. Based on that advice, Pye arranged with Respondent's engineering department, again under a seal of privilege, to determine the cost of completely replacing Skid 19. A BPXA engineer did such a study (now called the Skid 19 report) giving it to Pye in September. A copy went to Conrad and possibly Pickett, but not to Kreger. Pye placed it in the same binder which held the VECO report.

The original AKOSH citation had had been issued October 26; it was amended on November 15. At some point Attorney Kreger commissioned a third report for the purpose of arguing to AKOSH and the Union that the refinery standard did not apply, that the proper standard was the life safety code. It was written by Jack Woycheese, a consultant employed at the San Francisco (Walnut Creek), California office of Gage-Babcock & Associates. It is dated November 23. Woycheese is a professional fire consultant engineer. The Woycheese report was submitted to AKOSH. A final informal meeting was conducted between AKOSH (and its counsel), Respondent (and its counsel) and the Union on December 3. At that meeting, a copy of the Woycheese report was given to the Union. Woycheese attended the latter half of the meeting and explained his report

[2] Conrad is licensed to practice law in Alaska. Moreover, he holds inactive licenses in three additional states as well as the District of Columbia.

[3] On the North Slope, it is a near-universal practice for each employee and manager to have an interchangeable "alternate".

[4] Due to the numbers and locations of the vessels and structural I-beams.

in some detail. On December 14, AKOSH vacated the challenged portion of the now-amended citation. [5]

Shortly after the original citation was issued Bill Burkett, the then-chairman of the PACE Health and Safety Committee, demanded a copy of the VECO report. He and many of the bargaining unit employees had become aware that a report was being prepared by VECO (they had observed the data being collected by VECO employees with whom they had previously worked). A thread of e-mail messages passed back and forth between Bocast/Burkett and Pye. Pye responded that the VECO report had been requested by company attorneys in anticipation of litigation. Respondent did not provide the reports and this unfair labor practice charge followed.

A year later, on November 15, 2000, after the Regional Office advised that it would issue the instant complaint unless the matter was resolved, a meeting was held in Prudhoe Bay attended by both union and management representatives. Pye attended by speakerphone from an office in Anchorage. Pye explained that the reason the reports had not been provided was because they had been ordered up by the attorneys in anticipation of AKOSH litigation and the Company regarded them as privileged.[6] The parties were unable to find a way around the fact that the reports were privileged and the subject of attorney work-product. Respondent offered what it characterized as a "one page summary" but the Union rejected that offer, insisting on a copy of the report. The Union did offer a confidentiality agreement, which may have been appropriate for trade secret confidentiality, but was not regarded as fitting for a breach of the attorney-client relationship. Respondent now argues, though it did not mention it to the Union at the meeting, that the report contained 'self-critical' analysis which is constitutes an independent, third, privilege.

Pye points out the practical problem of releasing the report: "And that's why it is self-critical, because it can be used out of context, of saying that BP doesn't have 28 inch width anyplace people can work and that can be critical and be construed in a—out of context and make you look like you aren't addressing your safety concerns. The other thing is—is once that gets out [. . .]—saying that, it damages the reputation of the company, and reputation is worth a lot to us because it allows us not only to operate in Alaska but to operate in other locations, whether it be international or within the lower 48."

The Union was contending the passageways were too narrow and exits too few and therefore unsafe. Respondent knew it had followed the applicable codes at the time the structures were built and that they had been deemed safe at the time and afterwards. And, as an added precaution, it had added a fire suppression system, the Halon 1301 gas flooding system which (according to Woycheese's report) is non-toxic to the plant operators. With that knowledge, Pye did not want the Company to be subjected to uninformed claims that Skid 19 was, as Bocast reported people grumbling, a "death trap", when the Company considered it to be state of the art in fire safety precautions for facilities of this type. If the VECO report showed that the pathways and exits did not meet refinery, high hazard, standards, such information would be misleading since Skid 19 was only an ordinary hazard building and fell under different standards. Pye visualized the report being mischaracterized ("the Company's own report concedes Skid 19 does not meet safety standards") because the passageways and doors were designed for an ordinary hazard building. From Pye's perspective, it was essential to prevent misinformation, rumor, or spiteful commentary from overtaking the facts.

Furthermore, the report could be characterized as describing a worst-case scenario for the benefit of counsel. Pye testified: "I mean the intent of the report was taking it to worst case; if OSHA said thou shalt make everything 28[7] inches wide, [then] we would take that to litigation and we wanted to have the documentation, the attorneys wanted to have the documentation, to back that up." If that is so, then the report was, in some respects quite specialized. It was designed to demonstrate to counsel, for the purpose of getting his advice, to what extent BPXA needed to oppose the citations. It was not intended for the eyes of non-lawyers except to the extent that members of the "need to know" management group might need to discuss it with counsel. That is true even if counsel's only purpose in commissioning the reports was to determine the extent of BPXA's financial exposure. That knowledge is certainly an indispensable part of an attorney's discussion with a client. The decision to litigate often depends on the answer to that question.

Finally, in January 2001, according to Bocast, the Union proposed that an "independent expert" be commissioned to do a safety study on the problem. It asked Respondent to pay for that study but at the time of the hearing had not received an answer. And in March 2001, Bocast said, the Local Union sent some drawings to its International headquarters to see if it could internally reach some conclusions about the safety of the facility. It is clear that the Union does not wish to shoulder the cost of performing a like study. Yet there is no evidence that Respondent has prevented, or would prevent, the Union from conducting its own study of the facilities if it wished to do so.[8]

III. ANALYSIS AND CONCLUSIONS

The Supreme Court has held on several occasions that an employer must supply, upon appropriate demand, information to the employees' statutory representative information which is relevant to either the collective bargaining or the representational processes. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). See also *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965), enfg. 145 NLRB 152 (1963). Furthermore it has been consistently held that information relating to industrial health and safety meets the test of relevance. *Colgate-Palmolive Co.*, 261 NLRB 90 (1982), enfd. sub nom. *OCAW v. NLRB*, 711

[5] Although not germane to the issues here, the Union later filed a complaint against AKOSH with the U.S. Department of Labor's OSHA office of federal and state operations asserting that AKOSH had failed to carry out its federally delegated functions. This CAPSA, as it is called, was rejected by a lengthy letter from OSHA's assistant regional administrator on May 16, 2000.

[6] The Union's vice chairman, Kristjan Dye, recalled the matter differently, saying that Pye said something to the effect that Respondent had determined on an after-the-fact basis to declare the reports privileged. I find Dye to have misunderstood what Pye was reporting. All objective facts presented demonstrated that the VECO and Skid 19 reports were produced at the request of the attorneys in anticipation of litigation and under a mandate of confidentiality.

[7] The transcript incorrectly reports that he said "20" inches. The correct number is "28."

[8] Q. Is there anything else that would prevent the Union from going out and conducting a study of egress and exits in the gathering centers and at Skid 19?

A. (Witness Bocast) Not—not that I know of.

F.2d (D.C. Cir. 1983); *Goodyear Atomic Corp.*, 266 NLRB 890 (1983), enfd. 738 F.2d 155 (6th Cir. 1984). It is also true that although the material may be relevant, it does not necessarily mean that the material must always be produced. Claims of confidentiality and privilege can insulate the employer in some circumstances. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). In that event, the burden of rebutting the producibility and of proving confidentiality or privilege is on the employer. *Wayne Memorial Hospital*, 322 NLRB 100, 104 (1996); *Washington Gas Light Co.*, 273 NLRB 116 (1984); *McDonnell Douglas Corp.*, 224 NLRB 881, 890 (1976).

Here, Respondent has interposed the attorney-client privilege, and its corollary, the attorney work-product privilege, a defense to the Union's demand for production. To my knowledge there are no Board cases where this privilege has been either been invoked or accepted as a substantive defense to a proposed Board order. For the most part the issue comes up as a question of evidence; whether the document/communication be discovered and/or used at trial. Here it is not a question of evidence. Instead, the question is whether the privilege may trump the Board's enforcement of its statute. To my knowledge that question has never been presented to the Board, and it therefore is a matter of first impression. [9]

Before answering the question, one needs to understand the nature of the privilege.

The Supreme Court has addressed the privilege on several occasions, most recently in *Swidler & Berlin v. U.S.*, 524 U.S. 399 (1998). It noted: "The attorney-client privilege is one of the oldest recognized privileges for confidential communications. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). The privilege is intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.' *Upjohn*, supra, at 389, . . ."

The Court went on to hold (following a long tradition of similar holdings) that the privilege is so strong it survives the death of the client even in the face of a criminal investigation. It said, at 407–8:

> Clients consult attorneys for a wide variety of reasons, only one of which involves possible criminal liability. Many attorneys act as counselors on personal and family matters, where, in the course of obtaining the desired advice, confidences about family members or financial problems must be revealed in order to assure sound legal advice. The same is true of owners of small businesses who may regularly consult their attorneys about a variety of problems arising in the course of the business. These confidences may not come close to any sort of admission of criminal wrongdoing, but nonetheless be matters which the client would not wish divulged.
>
> The contention that the attorney is being required to disclose only what the client could have been required to disclose is at odds with the basis for the privilege even during the client's lifetime. In related cases, we have said that the loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place. See *Jaffee*, 518 U.S., at 12; *Fisher v. United States*, 425 U.S. 391, 403 (1976). This is true of disclosure before and after the client's death. . . . .
>
> [Fed.R.Evid.] 501's direction to look to "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" does not mandate that a rule, once established, should endure for all time. *Funk v. United States*, 290 U.S. 371 (1933). But here the Independent Counsel has simply not made a sufficient showing to overturn the common-law rule embodied in the prevailing caselaw. Interpreted in the light of reason and experience, that body of law requires that the attorney-client privilege prevent disclosure of the notes at issue in this case. [Id., 410–11]

Upjohn Co. v. U.S., 449 U.S. 383, 389–390 (1981), is the case which, for our purposes, best describes the nature of the attorney-client privilege. There the Court observed:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, EVIDENCE 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in *Trammel v. United States*, 445 U.S. 40, 51 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher v. United States*, 425 U.S. 391, 403 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"). Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation, *United States v. Louisville & Nashville R. Co.*, 236 U.S. 318, 336 (1915).

And, the Court's quotation from *Trammel* to the effect that lawyer needs to know all that relates to the client's reasons for seeking representation so that he or she may properly carry out the duty of counselor leads the discussion to the attorney work-product privilege.

The Court's decision in *Hickman v. Taylor*, 329 U.S. 495 (1947), established what the writers have described as a "qualified privilege" exempting an attorney's work product. The Court said, at 510–512:

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his vari-

[9] An administrative law judge did discuss the question of whether or not the privilege may be broken if the privilege covers the manner in which one does business and goes to the merits of the case. However, the Board reversed him relying on entirely different grounds and his discussion is without precedential force. See *Blankenship and Associates*, 290 NLRB 557 (1988), motion. for reconsideration. denied (unpub. order).

> ous duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways--aptly though roughly termed by the Circuit Court of Appeals in this case (153 F.2d 212, 223) as the 'Work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.
>
> We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning. *But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order.* [Emphasis added]

Hickman suggested that if a party can make a showing of substantial need, that there were rare circumstances in which an opposing party may obtain at least some type of attorney work product. The Court, however, said that in that case that the plaintiff had not established sufficient need to warrant such an invasion. At about the same time, what is now Fed.R.Civ.P. 26(b)(3) was amended to limit a party's discovery saying that work product was discoverable "only upon a showing that a party seeking discovery has a substantial need of the materials in preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means."

Those limits were again tested in *Upjohn*, supra. In that case, the company's general counsel, investigating questionable payments to foreign governments, under a warrant of confidentiality so he could give the company legal advice, obtained answers to questionnaires proffered to certain of its employees and officers. He also made interview notes and wrote memoranda about what the employees and officers had said concerning those payments. Upjohn thereafter voluntarily reported the payments which the investigation had uncovered to both the Securities and Exchange Commission and the Internal Revenue Service. The IRS issued a summons for all three types of document. Upjohn resisted, citing both the attorney-client privilege and the attorney work product privilege. The lower courts, albeit based on differing analyses, upheld the validity of the summons. However, the Supreme Court reversed. Citing both the ethics code and *Hickman*, the Court again noted an attorney's obligation to be apprised of all the relevant facts.[10] "The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant. See ABA Code of Professional Responsibility, Ethical Consideration 4-1: 'A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.'" At 390–91.

The Court held that the questionnaires were covered by the attorney-client privilege as confidential communications between the client and the lawyer. It also held that the notes and memoranda were protected by the work product privilege. Among other things, it observed that the company had given the IRS the list of names of the employees it had interviewed and that there was nothing which prohibited the IRS from performing like interviews.

It then said, at 401–402:

> It is clear that the Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work-product doctrine. The Magistrate applied the "substantial need" and "without undue hardship" standard articulated in the first part of Rule 26(b)(3). The notes and memoranda sought by the Government here, however, are work product based on oral statements. If they reveal communications, they are, in this case, protected by the attorney-client privilege. To the extent they do not reveal communications, they reveal the attorneys' mental processes in evaluating the communications. As Rule 26 and *Hickman* make clear, *such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.* [Italics supplied.]
>
> While we are not prepared at this juncture to say that such material is always protected by the work-product rule, we think a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure.

It is apparent, therefore, that the attorney-client and attorney work product privileges are available to a corporate Respondent such as BPXA. The first question then is whether they have

[10] The Board has said nearly the same thing. *Patrick Cudahy*, 288 NLRB, 968, 969–971 (1988).

been properly invoked. Are the VECO and Skid 19 reports confidential communications between the lawyers and their clients; are the reports attorney work-product; or both? I think the answer to the question is an obvious yes. Indeed, counsel for the General Counsel does not really challenge the contention, although she does not concede it outright either. It is nonetheless clear that attorney Conrad directed that both reports be created so that he could conduct more informed discussions with the BPXA managers in terms of how the AKOSH litigation should be handled. I find, in that circumstance that both reports are covered by both the attorney-client and the attorney work product privileges. The reports are tangible items which are capable of being produced, but like the questionnaires in *Upjohn* are covered by the attorney-client privilege. The fact that the attorney delegated the task of investigating and drafting the reports to others, rather than doing it himself as in *Upjohn*, is insignificant. He had given the instructions to persons within the seal of confidentiality and had received it for the express purpose of advising the client. In addition, they were prepared specifically for the purpose of educating himself concerning the extent of the possibility and extent of potential liability. He was literally following the mandate of *Hickman* and *Upjohn* to become apprised of all the relevant facts concerning the AKOSH citation. He was doing his job. In that situation, even though it is not clear that his mental impressions are contained in the reports, they are nonetheless an essential part of his private course of preparation. As such, they are his work product.

In evidentiary contexts, that would be the end of the matter, assuming the party seeking the privileged material has made no effort to establish an exception. With respect to the attorney-client privilege, the two most obvious exceptions are 1. Breach/revelation by the client and 2. The crime-fraud exception. [11] These need not be discussed in any depth here because the General Counsel does not contend that either applies.

Instead, because these privileges have been proffered as a substantive defense to an unfair labor practice charge, however, the General Counsel argues two main points. First, that the requirements of the Act override the defense and second, that even if there are legitimate matters which need to be kept confidential, the parties should bargain over what can be released.[12] BPXA counters that privileged attorney-client communications and work product are an inappropriate matter for bargaining. It does not visualize any way whereby such communications can be released without swallowing the privilege. Connected to that, it seems to be suggesting that this is a permissive, not mandatory, bargaining subject. [13]

Indeed, what happened here was entirely predictable and demonstrates the impracticality of the second of the General Counsel's theories. When the Board's Regional Office suggested that the parties try to resolve their differences (upon pain of issuing a complaint) both parties found themselves forced to adhere to their respective positions. Respondent was willing to try to draft a summary of what the reports contained; the Union, unsatisfied with the Woycheese report, wanted to leave the room with copies of both the VECO and the Skid 19 reports. It did offer a confidentiality agreement to BPXA, but that was aimed at third parties and did not address Respondent's concern. The Union still would have seen the privileged material. Negotiating over attorney-client/attorney work product is not realistic. In the final analysis, such an aim is probably unworkable. Attempting to equate the attorney privileges with confidential matters such as trade secrets,[14] medical records,[15] informant names,[16] and the like is simply not feasible. There is room for maneuvering with respect to such matters. E.g. *Exxon Co. USA*, 321 NLRB 896, 899 (1996). There is no such room when it comes to communications between lawyer and client. Bargaining is not an option if the client wishes the communications to remain within the privilege.

Since the General Counsel has not presented or argued that an exception should apply permitting invasion of the privilege, the question is whether Section 8(a)(5) and Section 8(d) obligate the employer to provide the information anyway. As noted infra, some portion of the reports contain material which is relevant to the industrial safety of the unit employees who work at Skid 19. The information is therefore presumptively relevant and, if presumptively relevant, an employer must turn them over upon the 9(a) union's request. *Colgate-Palmolive Co.* and *Goodyear Atomic Corp.*, both supra. In that circumstance, as noted supra, the burden shifts to the employer to demonstrate by a legitimate and substantial justification why the request for the confidential material should not be granted.

The obvious proffered reason is the attorney privileges themselves. Is that enough to block a Board order? The second reason proffered is that the Union has not really advanced sufficient necessity and unavailability to warrant such an order given the interposition of the privileges. Like the Court in *Upjohn* I do not know what level of need and unavailability might pierce the privileges, though based on the Court's guidance I must agree that the two privileges are not absolute. And, if one were to follow a balancing test such as that utilized in *Minnesota Mining & Mfg.*, supra (following the path set by *Detroit Edison Co.*, supra) one might be persuaded that the balance should tip in favor of disclosure, at least in part. Yet, I am unable to see how the balancing test is any better than imposing an obligation to bargain over what can or cannot be released, unless the holder of the privilege decides to waive it or if the

[11] The Board held, in *Patrick Cudahy*, supra, that the crime-fraud exception does not apply to attorneys and their clients who may be considering how to commit unfair labor practices.

[12] The latter theory is not encompassed by the language of the complaint which speaks only of a refusal to supply the reports. It does not assert an affirmative obligation to bargain about release of their contents, although it easily could have done so for the Region, well before the hearing, became aware of Respondent's reasons for not turning the reports over to the Union.

[13] Respondent also attempts to interpose a third privilege, the so-called "self critical analysis" privilege, citing cases and a law review article. See Vandegrift, *Legal Development: The Privilege of Self-Critical Analysis: A Survey of Law*, 60 Alb.L.Rev. 171 (1996). This is a developing, and not widely accepted privilege, seemingly most useful in products liability cases. I do not find it helpful here and the Board has not even confronted, much less adopted it. In some respects it seems antithetical to the purposes of the Act, for it only tends to obscure the transparency between unions and management which the Act promotes. In any event it is unnecessary to consider it here. Curiously, at least one court case involving the Board seems to have given the privilege recognition. *Electrical Workers IUE (Westinghouse Electric) v. NLRB)*, 648 F.2d 18, 28 (D.C. Cir. 1980) (Barring access to entire affirmative action files as production of the material was outweighed by desirability of frank self-analysis by the employer.)

[14] *Borden Chemical Co.*, 261 NLRB 64 (1982), enfd. sub nom. *OCAW v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983).

[15] *Minnesota Mining & Mfg. Co.*, 261 NLRB 27 (1982), enfd. sub nom. *OCAW v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983).

[16] *Pennsylvania Power & Light*, 301 NLRB 1104 (1991).

Board began to pick and choose what might be released. Insofar as the latter is concerned, the Board does not want to be in the business of parsing a document to determine what should and what should not be released. It seems to me that the only decisional rationale which can reasonably resolve the issue without doing violence to the privilege is to note that the Union has never been barred from doing its own investigation and writing its own report. As Bocast admitted, he knew of no reason why that could not be done. The raw data is available to the Union if it would only take the steps to collect and marshal it. Certainly the Union has not shown any undue hardship that it would encounter in obtaining the material itself if the VECO and Skid 19 reports were not given it. Moreover, as in *Upjohn*, at least some of the material has already been made available to it in the form of the Woycheese report, though its emphasis is somewhat different. Furthermore, whatever conclusions might have been made by the authors of the VECO and Skid 19 reports are not of any concern to the Union because it would need to draw its own conclusions from the data.

In *Upjohn*, the Court, utilizing *Hickman* and Fed.R.Civ.P 26 as a guide, said that for a court to order production of attorney privileged material, even a showing of substantial need and a showing of undergoing undue hardship to acquire it are not enough. [17] There has to be more. It is a very high bar to cross. Later, in *Swidler & Berlin*, supra, the Court underscored the height of the bar when it held that even a death which inhibits a criminal investigation is not strong enough to get over it.

[17] "As Rule 26 and *Hickman* make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship." *Upjohn*, at 401.

In this instance, I find that the General Counsel and the Union have failed even to get as close to piercing the privileges as the IRS did in *Upjohn*. Although I do think that the Union has shown that the reports would be useful to their ongoing inquiry into industrial safety, it has not shown that it has a substantial need for them. Furthermore, it has not shown any hardship whatsoever in its quest to obtain the data. All the Union has to do is to put its own expert into the field and the data would come to it. Nothing is stopping the Union from taking that step. Accordingly, I find the General Counsel has failed to show that the Union's need is sufficiently substantial or that the Union's hardship even gets to, much less exceeds, the "undue" level. The quantum of proof reached here is plainly insufficient to require BPXA to shed the cloak of the attorney-client and the attorney work product privileges. The case will be dismissed.

CONCLUSIONS OF LAW

1. Respondent BPXA is an employer engaged in interstate commerce and in an industry affecting interstate commerce with the meaning of § 2(2), (6), and (7) of the Act.

2. The union is a labor organization within the meaning of §2(5) of the Act.

3. Respondent has not committed the unfair labor practice alleged in the complaint, nor did it have any obligation to bargain over the production of the material which the Union wished produced.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER

The complaint is dismissed in its entirety.